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THEORIES OF MATERNAL AFFILIATION IN ADOPTION.

According to Hindu religious beliefs a son is desired for securing immortality to his father (अमृतत्व) and for perpetuating his lineage (वम्शस्य अविच्छेदः). In the absence therefore of an *aurasa* son to a person, a *pratinidhi* or substitute through the process of adoption is permitted. A text of Atri cited in the Dattaka Mimamsa declares :

अपुत्रेणैव कर्त्तव्यः पुत्रप्रतिनिधिः सदा ।
पिण्डोदक क्रियाहेतोः यस्मात् तस्मात् प्रयत्नतः ॥

The object of adoption is thus twofold : (1) to provide for the offering of *pindas* to the adopter (पिण्डसंस्थापनाय) and (2) to continue his line (नामसङ्कीर्त्तनाय). These ideas are brought out in the text of Manu :

अपुत्रेणैव सुतः कार्यो यादृक् तादृक् प्रयत्नतः ।
पिण्डोदकक्रियाहेतोः नामसङ्कीर्त्तनाय च ॥

From the texts cited two points emerge : (1) the adopted son is a *pratinidhi* for the *aurasa* son and (2) adoption looks to the future and not to the past. The use of the term *pratinidhi* to describe the adopted son is significant. It suggests that even for spiritual purposes the adopted son is not to be equated with the *aurasa* son. Jaimini's conclusion is that " in employing a *pratinidhi* the vedic rite does not yield the full reward of the religious act[1]". Satyashada goes in fact so far as to say that there can be no substitute at all as regards the sacrificer, the wife, the son, etc.[2], prescribed for any rite by the vedic texts. The Sukra Niti bluntly states though for a different reason that the adopted son should never be thought of as one's son —मनसापि नमन्तव्या दत्ताद्याः स्वसुता इति[3]. Manu points out that a secondary son is always only second best[4]. Even as the use of oil is permitted in the place of ghee where it is not available, likewise an adopted son may be sought by one who has no *aurasa* son[5]. At another place the same sage has remarked : " a man desiring to cross beyond the gloom (of hells) through inferior sons (such as the *kshetraja*) secures a result similar to that of a person crossing (a sheet of) water in a leaking boat receives[6]". The inferiority of the adopted son is not confined to spiritual matters only but also to secular rites. This is clear from Vasistha's text providing for a smaller share of the patrimony for the adopted son co-existing with an afterborn *aurasa* son. It is with reference to such ideologies and textual

1. VI. 3, 13, 41.
2. Srauta Sutras, III. 1.
3. II. 31.
4. Manu, IX. 180.
5. Manu, IX. 181.
6. *Ibid.* 161.

background that the position of the adopted son has to be elucidated. Statements like "*adoptio enim naturam imitatur*", "the adopted son is the reflection of a real son" are only attractive and picturesque figures of speech to bring out some special feature or other of adoption and will hardly justify any attempt to reproduce for the adopted son every one of the features associated with the *aurasa* son. An aid to understanding cannot be converted into an identity enabling one to turn round and work out the connotation thereof. It is salutary to remember right through that the adopted son is after all a son by fiction only. To adapt the words of Lord Truro in *Egerton* v. *Brownlow*[1] uttered in another context, the fiction of adoption constitutes "a very unruly horse and when once you get astride of it you never know where it will carry you." The caution enjoined in *Subramanian Chettiar* v. *Somasundaram Chettiar*[2] that "even a fiction cannot be carried to illogical limits" is too wholesome to be ignored.

There are at least three different theories in regard to maternal affiliation in adoption that have been suggested at some place or other. They are (1) it arises only by relationship of a woman to the adopter as his wife ; (2) it is the result of the wife's co-operation with the husband in the ceremonies of adoption ; (3) it is a necessary consequence of the fiction that adoption constitutes a new birth for the boy in the adoptive family, so much so, he must have a mother in the family if one can be found for him from among the wives of the adopter if he has or had any. Some support is available for each of these views but none of them can, as expressed, be accepted.

Adoption is always to the male whether done by himself or by his wife after his death. The consent of the wife to the adoption is unnecessary and it may be done even against her opposition. Nor is there any text of the Sastras forbidding such adoptions. A passage of the Dattaka Mimamsa expressly states that the wife of the adopter would in such cases become the mother of the adopted boy[3]. The text is: "If the case is thus, (it may be said) the assent of the wife is requisite for the husband also ; for the purpose (of such sanction) would be the same (as that of the husband to the adoption by the wife). This (if alleged) is wrong ; for in consequence of the superiority of the husband, by his mere act of adoption the filiation of the adopted as the son of the wife is complete in the same manner as her property in any other thing accepted by the husband." If filiation is independent of the wife's co-operation, it would follow that any association of hers in the ceremony of adoption, if there is one, can only be by way of a religious formality and can by itself possess no legal significance. It is thus wifehood and not ceremonial participation that would create the maternal affiliation. In *Narain Dat* v. *Gopal Das*[4], it was in fact held that the wife of the adopter becomes the mother of the adopted boy notwithstanding her refusal of consent to the adoption. Logically pursued this train of reasoning would lead to the result that where a person has a plurality of wives all of them would in law become mothers of the boy irrespective of any question of co-operation or participation by them in the ceremony of adoption. Nor would it make any difference if the wife or wives is or are dead at the time of adoption or is or are married by the adopter subsequent to the adoption. There is a text of Manu :

सर्वासाम् एक पत्नीनाम् एका चेत् पुत्रिणी भवेत् ।
सर्वास्ता तेन पुत्रेण पुत्रिण्यो मनुरब्रवीत् ॥

—"If among all the wives of the same man one becomes the mother of a son, Manu says that by that son all of them become mothers of male issue." A text of Sumantu cited in the Smriti Chandrika and the Parasara Madhaviya declares :

पितृपत्न्यः सर्वा मातरः तद्भ्रातरो मातुलाः तद्भगिन्यो मातृस्वसारः तद्दुहितश्च भगिन्यः तदपत्यानि भागिनेयानि । अन्यथा सङ्करकारिणः स्युः ।

1. (1853) 4 H L.C. 1, 196 : 10 E.R. 359.
2. (1937) 1 M.L.J. 60 : I.L.R. 59 Mad. 1064.
3. Dattaka Mimamsa, I—22.
4. (1915) 33 I.C. 361.

—All the wives of the father are mothers, the brothers of these are one's maternal uncles, their sisters are one's mother's sisters, the daughters of these are one's sisters and the children of the latter are one's sisters' children ; otherwise there would be confusion. The principle is regarded by Mayne evidently, to be so complete, at least with reference to maternal affiliation, as to operate in regard to secular rights as well. Thus he states[1] : " The theory of adoption is that it makes the son adopted, to all intents and purposes the son of his father, as completely as if he had begotten him in lawful wedlock. *The lawful son of the father is the son of all his wives* and would, therefore, I presume be the heir to all or any of them. And so it has been laid down that *a son adopted by one wife becomes the son of all and succeeds to the property of all. The same result must follow where the son is adopted not by the wife but by the man himself*" (Italics ours). In *Tiruvengalam* v. *Butchayya*[2], it was observed : " If it (adoption) be merely regarded as a fiction, there must be no difficulty whatever in a person bearing the same relationship to two or more persons." And in *Annapurni Nachiar* v. *Forbes*[3], Jardine, Q.C., seems to have conceded in the course of his arguments (p. 4) : " Where all was fiction it was perhaps not cogent to distinguish the impossibility of there being several such parents in reality." Two remarks fall to be made. In a series of cases it has now been held by courts that more than one wife of the adopter cannot become the mother of the boy for purposes of succession. The principle that in spite of the wife's dissent she would become the mother of the boy by reason of the superiority of the husband and the adoption being to him only is accepted. But a logical working of the principle is not permitted where the adopter has more than one wife. Under the Sastras the theory of maternity arising in favour of all the wives of a person seems to be confined to the spiritual and not to be concerned with the secular results. Manu himself has suggested that where one of the wives of a person has a son the other wives are to be regarded as step-mothers only[4]. It may be argued that this is intelligible, inasmuch as the tie between the genetive mother and the son is both corporeal and spiritual whereas with the co-wives of the father it is spiritual merely, but that in the case of a son by adoption this ground of differentiation is non-existent. It may again be pointed out that an adoption is made for two reasons, one temporal (perpetuation of the lineage), and the other spiritual ; that the former consideration is irrelevant in the case of a married woman as she has no lineage apart from that of the husband to perpetuate, that the adopted son would satisfy all the requirements of all the wives in regard to their obsequies, etc., and therefore at any rate in adoption all the wives of the adopter would become the mothers of the boy. The argument is consistent with Jagannatha's remark[5] that if a son be adopted by a man married to two wives he would have two maternal grandfathers and the two sets of maternal ancestors should be jointly considered as the manes of the ancestors. It also fits in with the statement in the Vyavastha Chandrika[6] that if an adopted son is received by none of the wives either in conjunction with or under the authority of the husband but by the husband alone, the adopted son should perform the *parvana sraddha* in honour of the ancestors of all such wives of the adopter. It is, however, clear that these texts have all been adverting to the spiritual results flowing from an adoption and have not been directed towards the question of secular rights arising from it. To extend the operation of these texts to govern secular rights will give rise to anomalies. To say that in the case of an *aurasa* son the genetive mother alone has the status of a mother and the co-wives the status of step-mothers merely, but that in the case of an adopted son all the wives of the adopter will acquire the status of mother to the boy for all purposes solely by reason of their relation as wives of the adopter would vest rights of inheritance in the adopted son which would not be available

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1. Hindu Law & Usage, 1st Edn., para. 154.
2. (1927) 55 M.L.J. 757 : I.L.R. 52 Mad. 373.
3. (1899) 9 M.L.J. 209 : L.R. 26 I.A. 246 : I.L.R. 23 Mad. 1 (P.C.).
4. Manu, IX. 183.
5. Colebrooke's Hindu Law, 4th Edn., Vol. II, p. 394.
6. Vol. II, p. 147, verse 32.

to an *aurasa* son. A substitute cannot transcend the real son ; nor will such a position be consistent with the text of Vasishtha postulating the inferiority of the adopted son in relation to the *aurasa* son. The proper way therefore of understanding the text of the Dattaka Mimamsa about the wife of the adopter becoming the mother of the adopted boy independently of her volition would be to confine it to matters spiritual.

Golap Chandra Sirkar Sastri has expressed the view that maternal affiliation in adoption arises only where the wife has agreed to the adoption and that she will not become the mother of a son adopted against her wishes and without her co-operation[1]. Sir Francis Macnaghten states a similar rule but in different language. According to him when a son is adopted in conjunction with one of several wives of a person the receiving mother alone would become the mother of the boy[2]. It is possible to regard the observation as stating a rule of preference merely. But it seems to have been understood differently, see *Teen Cowree* v. *Dinonath*[3], *Kasheeshuree Debia* v. *Greesh Chunder Lahoree*[4]. An observation of the Privy Council in *Venkata Narasimha* v. *Parthasarathy*[5] lends some colour to the view that maternal affiliation arises by receipt of the child in adoption by the wife of the adopter. The Privy Council stated : " Only one wife can receive the child in adoption so as to step into the position of being its adoptive mother. This is evident from the cases that establish that the receiving mother acquires in the eye of the law the same position as a natural mother to such an extent that her parents become legally the maternal grandparents of the child. To hold that a child could bear such a relationship to more than one mother would be entirely contrary to settled law and would produce inextricable confusion in the law of inheritance." It is not clear if the Privy Council thought that the receipt of the child by the woman carries with it a symbolical suggestion of the child being born to her. There is no warrant for any such reasoning. Again to so hold would be inconsistent with the position recognised by the Courts that where a person is adopted without the co-operation of the wife she would still become the mother of the boy for all purposes. In *Sham Kuar* v. *Gaya Din*[6], it was recognised by a Full Bench of the Allahabad High Court that an adoption is concerned with securing advantages to the adoptive father only, nevertheless, the association of the wife with him in adoption would make her the mother of the adopted boy. The Full Bench observed : " Looking to the object of the rite of adoption we find it to be to ensure by providing a son the spiritual benefit of the adoptive father and the perpetuation of his family name rather than to obtain any benefit for the adoptive mother whose happiness in a future state is not so dependent on having a son to perform the funeral obsequies and can be otherwise secured, and it is also the fact that the wife has no power to adopt on her own account, the right being absolute in the husband . . . . . But on the other hand we find that the wife is associated in making the adoption with the husband and *its effect is declared to be to make the adopted child the son of the adoptive mother as well as of the adoptive father* " (Italics ours). The only textual authority cited in support of the theory of maternal affiliation arising by reason of ceremonial association is a statement in the Dattaka Mimamsa employing the term *pratigrahitri mata* to refer to the mother of the boy adopted. The passage is as follows :

दत्तकादीनां मातामहा अपिप्रतिग्रहीत्रीयामाता तत्पितर एव पितृन्यायस्य मातामहेष्वपि समानत्वात् ।

—" the forefathers of the adoptive mother only are also the maternal grandsires of the son given and the rest ; for the rule regarding the paternal is equally applicable

1. T. L. L. for 1888, p. 215.
2. Considerations in Hindu Law, p. 168.
3. (1865) 3 W.R. 49.
4. (1864) W.R. Sup. Vol. 71.
5. (1914) 26 M.L.J. 411 : L.R. 41 I.A. 51 : I.L.R. 37 Mad. 199, 220 (P.C.).
6. (1876) I.L.R. 1 All. 255 (F.B.).

to the maternal grandsires of adopted sons[1]". The Dattaka Chandrika contains a similar statement[2] :

शुद्धदत्तकस्य तु प्रतिग्रहीत्र्या एव मातुः पित्रादि पिण्डदानम्

—" but the absolutely adopted son presents oblations to the father and the other ancestors of his adoptive mother only." The argument based on these texts is that the term *pratigrahitri mata* means " receiving mother " and suggests that motherhood in adoption arises by reason of the actual receipt of the boy by the wife of the adopter, that is, by reason of her ceremonial co-operation. The deduction is open to criticism. For one thing, the context in which the phrase occurs shows that the reference is not to any *actual* receipt of the boy by the wife but to adoptive mother *in general*. The statement is made in discussing the claims of the ancestors of the adoptive mother and natural mother as the maternal ancestors of the adopted son and has nothing to do with the question as to how or which of the wives of the adopter becomes the mother of the boy. The previous verses refer to the other kinds of affiliation of a son such as the *dvyamushyayana*, *kritrima*, etc., and the instant verse to *suddha dattaka*, to draw a contrast between their effects. The object of the verses seems to be to point out that the *dattaka* son is a substitute for the *aurasa* son in this matter. The etymological meaning of *pratigrahitri mata* would thus not be intended. Again even where an adoption is made by a widow, her deceased husband is described similarly. It is thus said that in such cases " the *sakha* of the vedas is that of the adopter only[3]". Obviously the description would be inadmissible if it refers to the actual receipt of he boy. It is noteworthy that the term *pratigrahitri mata* has always been understood by scholars as referring to an adoptive mother generally and not as carrying its etymological significance[4]. In the notes of arguments of counsel in *Annapurni Nachiar* v. *Forbes*[5], it is stated that when Mr. Jardine, Q.C., mentioned that the etymological meaning of the word translated by Sutherland as " adopting mother " was " receiving mother " Lord Hobhouse remarked : " I do not know whether there is any essential difference between the two." The foregoing considerations show that the texts do not afford any support to the view that maternal affiliation in adoption arises through ceremonial participation, whatever other repercussions such participation may have The judicial decisions have held that ceremonial participation would at any rate constitute a rule of preference in deciding which of the several wives of the adopter will step into the position of the mother of the boy for purposes of inheritance to the boy or by the boy. It is clear that the theory of maternal affiliation resulting through ceremonial participation only is hard to reconcile with the recognition of adoption by bachelors or widowers. Nor will the theory fit in with the conclusion that where a person having an only wife adopts without her co-operation, nevertheless, such wife will become the mother of the boy in the eye of law for secular purposes, as was held in *Narain Dat* v. *Gopal Das*[6]. In *Annapurni Nachiar* v. *Forbes*[5], in rejecting the argument of Mr. Mayne that inasmuch as the adoption was to the male only the association of the wife does not add anything effective to the ceremony and no advantage to the woman could arise by such association, the Privy Council observed : " It seems not to be doubted that a man may authorise a single one of several wives to adopt after his death or that she would on adoption stand in the place of the natural mother. If he can do that, it would be very capricious to deny him the power of selecting a single wife to join with him in his lifetime in adopting a boy with the same effect on her relations with that boy." In *Yamuna Bai* v. *Jamuna Bai*[7], a certain person *M* had two wives Yamuna and Jamuna. He adopted a boy *R* in 1916. It was found that while Yamuna admittedly took part in the ceremony of adoption Jamuna had not been excluded therefrom. *M* died in 1921

1. Dattaka Mimamsa, VI. 50.
2. Dattaka Chandrika, III. 17.
3. Dattaka Mimamsa, VI. 49 ; Dattaka Chandrika, III. 17.
4. Bhattacharya, Hindu Law, Vol. I, p. 357 : Sutherland's Translation cited in I.L.R. 6 Cal. 256.
5. (1899) 9 M.L.J. 209, 212 : L.R. 26 I.A. 246 : I.L.R. 23 Mad. 1 (P.C.).
6. (1915) 33 I.C. 361.
7. A.I.R. 1929 Nag. 211.

and *R* in 1923. On a question of succession to the properties of *R*, it was held that Yamuna alone was to be regarded as a mother in view of her admitted ceremonial association. The same principle was applied by the Calcutta High Court to determine which of the wives of the adopter, a predeceased wife or a wife living at the time of adoption should be regarded as the mother of the adopted boy. In *Gunamani Dasi* v. *Debi Prosanna Chowdry*[1], it was assumed that the living wife had participated in the adoption and therefore should be treated as the mother of the adopted boy in preference to the predeceased wife of the adopter.

Another theory as to maternal affiliation in adoption has been rested on the fiction that the adopted boy should be deemed to be born of the adopter's wife. In *Dattatraya* v. *Gangabai*[2], Macleod, C.J., observed : "It would seem strange if an adopted son having left his natural family were to be considered as the son of his adoptive father only and not of his adoptive mother." This observation becomes intelligible only if adoption operated as civil death in the original family and as re-birth in the adoptive family. In *Uma Sunker Moitra* v. *Kali Komul*[3], such a view was postulated. Romesh Chunder Mitter, J., observed : "The theory of adoption depends upon the principle of a *complete severance* of the child adopted from the family in which he is born both in respect to the paternal and maternal line, and his *complete substitution* into the adopter's family as if he were born in it." This view was based on the text of Manu[4] :

गोत्ररिक्थे जनयितुर्न हरेद् दत्रिमः क्वचित् ।
गोत्ररिक्थानुगः पिण्डो व्यपैति ददतः स्वधा ॥

—"The son given should not take the *gotra* (family name) and the wealth of his natural father; the *pinda* follows the *gotra* and the wealth ; of him who gives (his son in adoption) the *svadha* (obsequial rites) ceases (so far as that son is concerned)." In *Birbhadra* v. *Kalpataru*[5], Mukerji, J., carried the meaning of Manu's text even farther than had been done by Mitter, J., in the earlier case. He observed : "an absolute adoption appears to operate as birth of the boy in the family of adoption and as civil death in the family of birth having regard to the legal consequences that are incidents of such adoption." Likewise in *Ganga Sahai* v. *Lekhraj Singh*[6], Mahmood, J., remarked : "Adoption is itself 'second birth' proceeding upon the fiction of the law that the adopted son is 'born again' into the adoptive family by the rites of initiation." Some support is afforded to this theory by observations of the Privy Council that the adopted son occupies the *same position* in the family of the adopter as a natural born son except in a few instances which are accurately defined in the Dattaka Chandrika and the Dattaka Mimamsa—see *Padma Kumari* v. *Court of Wards*[7], *Kali Komul Mozumdar* v. *Uma Sunker Moitra*[8]. From this theory of adoption operating as a re-birth in the adoptive family it was not a far cry that the boy should have a mother in the new family and one should therefore be found for him from the living or the dead wife or wives of the adopter, wherever that can be done. It has practically been so put in *Sundaramma* v. *Venkatasubba Aiyar*[9]. Referring to the observation in the *Medur case*[10], that it is only that one among the wives that is associated in adoption that will become the mother of the boy, Phillips, J., said : "This conclusion appears to be based on the theory of adoption, namely, that the adopted son becomes the natural son of the father, and the only way in which he can be deemed to be the natural and legitimate son of his father is by a fiction that he is a son of that father's wife also . . . . . It would be straining the legal fiction of adoption too far to hold that the boy need have no mother at all although this may possibly be necessary in the case of an adoption by a bachelor but that is

1. (1919) 23 Cal.W.N. 1038.
2. (1921) I.L.R. 46 Bom. 541, 559.
3. (1880) I.L.R. 6 Cal. 256 (F.B.).
4. Manu, IX. 142.
5. (1905) 1 Cal. L.J. 388.
6. (1887) I.L.R. 9 All. 253.
7. (1881) L.R. 8 I.A. 229 : I.L.R. 8 Cal. 302 (P.C.).
8. (1883) L.R. 10 I.A. 138 : I.L.R. 10 Cal. 232 (P.C.).
9. (1926) 51 M.L.J. 545 : I.L.R. 49 Mad. 941.
10. (1914) 26 M.L.J. 411 : L.R. 41 I.A. 51 : I.L.R. 37 Mad. 199 (P.C.).

an exceptional case with which we are not concerned now. . . . . Wherever possible, therefore a mother should be found for the boy." Phillips, J., is conscious that the fiction of adoption should not be strained too far, yet he feels no strain when he adds to the fiction of the adopted son being a substitute for a real son the further fiction that he must be deemed to have been born of a wife of the adopter. Phillips, J., fully realises that the theory that the adopted son should have a mother will not work and could not be reconciled with the recognition accorded to a bachelor's adoption, but seeks consolation in the fact that such cases are exceptional. It is difficult to perceive what warrant is available to treat adoptions by bachelors alone as exceptional but not adoptions by widowers or adoptions by one without associating any wife. Madhavan Nair, J., the other learned Judge in the case observed : " To give full effect to the fiction of adoption and to assimilate the fact to an imitation of nature the adopted boy should have a mother." These lines of reasoning commended themselves to a Full Bench in *Sowntharapandian* v. *Periaveeru*[1]. In the course of his judgment in the case Ramesam, J., stated : " The object of adoption is to have a substitute for a natural born son. Accordingly the theory of Hindu lawyers has always been that, apart from the fiction of adoption itself the adopted son should be as complete a substitute for the natural born son in all respects as one can possibly make. In other respects, except for the fact of his birth, he should occupy the position of a natural born son ; there should be nothing extraordinary, peculiar or unnatural about him. One of the most inevitable features about every human being is that he must have two parents, that is, a father and a mother. Similarly every adopted son should have an adoptive father and an adoptive mother ; and if there is no difficulty in pointing to an adoptive mother of the boy one ought to do so unless there is something in the texts or the decisions compelling us to hold that only the person who actually participated in the adoption can be regarded as the mother." With great respect, it may be pointed out that the argument is the result of attributing to a device designed to secure purely spiritual ends all the secular results following on actual birth in the adoptive family. The learned Judge remarks that there should be nothing " extraordinary, peculiar or unnatural " about the position of the adopted son. Is there nothing "extraordinary, peculiar or unnatural " in making a dead woman the mother of the boy adopted by a widower by attributing to her the motherhood of the boy, for instance, where the boy might perhaps have been born long after the death of the woman ? Is there nothing " extraordinary, peculiar or unnatural " in treating a boy of some years of age as having actually been begotten by the adopter's wife at the moment of adoption ? In sooth all these arguments will have no place if there is no real warrant for the theory of adoption operating as a new birth in the adoptive family. So logically has this theory of re-birth in the adoptive family been applied that in one decision, *Subramanian* v. *Muthiah Chettiar*[2], it has been held that where a widower adopted, not merely should the predeceased wife be treated as the mother of the boy but the adoption would be deemed to relate back to the death of such predeceased wife so as to enable the adopted son to recover the property of the woman which on her death had been taken by her stridhana heirs. The only textual authority on which these doctrines are apparently based, namely, that of Manu does not support the theory of adoption operating as a complete severance of the boy from his natural family or as a complete substitution or re-birth in the adoptive family. The Courts have recognised that for purposes of marriage, prohibited degrees of relationship will have to be observed by the adopted son in the natural family also, *Bai Kesarba* v. *Shiv Sanghji*[3], *Basappa* v. *Gurlingawa*[4]. Similarly in regard to property already taken in the natural family prior to the adoption it is held that adoption will not operate as civil death and cause a divestiture of such property, *Venkatanarasimha* v. *Rangayya*[5], *Behari Lal* v. *Kailas Chunder*[6], *Shyama Charan* v. *Sri Charan*[7].

1. (1933) 65 M.L.J. 58 : I.L.R. 56 Mad. 759 (F.B.).
2. (1945) 2 M.L.J. 337 : I.L.R. (1945) Mad. 638.
3. (1932) 34 Bom.L.R. 1332, 1352.
4. (1932) I.L.R. 57 Bom. 74, 81.
5. (1905) 16 M.L.J. 178 : I.L.R. 29 Mad. 437.
6. (1896) 1 Cal. W.N. 121.
7. (1929) I.L.R. 56 Cal. 1135.

And in *Raghuraj Chandra* v. *Subhadra*[1], the Privy Council has affirmed that "as has been more than once observed the expressions 'civilly dead' or 'as if he had never been born in the family' are not for all purposes correct or logically applicable but they are complementary to the term 'new birth'." Again it has been recognised that the theory that the adopted boy should have a mother in the new family cannot always apply, as for instance, in the case of an adoption by a bachelor. The true position would seem to be that the Sastras deal with maternal affiliation only for purposes of securing spiritual services to the wives of the adopter and their ancestors and not from the point of view of evaluating secular rights either of the boy in respect to the wives of the adopter or *vice versa*. Decisions of the Privy Council have anyway provided certain tests to determine who shall be regarded as the adoptive mother of the boy for purposes of inheritance, where there is more than one wife to the adopter. It has been suggested that where the husband has selected one of the wives to associate with him in the ceremony of adoption, as a result of that preference that wife can be regarded as the mother of the boy and the other wives as step-mothers. Similarly if a husband has given a power of adoption to one of his wives but not to others the wife so preferred would on her adopting a boy become the boy's mother. Where there is no such preferment and the husband is dead the senior wife is recognised as having the preferential right to adopt, if she is blameless, with the consent of the sapindas and become the mother of the boy. The same principle is held to govern where the husband has empowered all his wives severally to adopt to him. There is however no decision of the Privy Council dealing with the question of maternal affiliation for purposes of rights of inheritance in the case of an adoption by a widower. Nor have the following cases fell to be judicially tackled : (*i*) where a bachelor adopts, (*ii*) where a man having more than one wife adopts a son without associating any of them with him, (*iii*) where a widower adopts a boy and later marries again, (*iv*) where there were more than one wife to a widower who adopts after the death of all of them. So far as spiritual purposes are concerned, according to the Sastras maternal affiliation will extend to any or all the wives of the adopter as the case may be, living, dead or married subsequently ; but for rights of inheritance no such relationship could be reckoned. Under the decisions the position is somewhat confused. Thus in the case of a bachelor it may be that, on the theory that wherever possible a mother should be found for the adopted boy, any wife taken by the bachelor subsequent to the adoption or the first of such wives could be regarded as the mother of the boy and her ancestors his maternal ancestors . But that would mean that the emergence of a mother for the boy would depend on a future uncertain event. In the case of a man having many wives and adopting a son without associating any of them, the senior wife would probably be regarded as the mother of the boy. In the case of an adoption by a widower who subsequently marries again the pre-deceased wife alone is likely to be regarded as the boy's mother inasmuch as the re-marriage was an uncertain event at the time of the adoption. As regards the last of the problems, the answer seems to be that that wife of the widower who died last should be regarded as the mother of the adopted boy and her ancestors as the maternal ancestors of the boy. Where a person has more than one wife, in the absence of a preference in favour of any one of them by the husband for purposes of adoption the law casts the preference in favour of the senior wife, that is, that wife who was married first, for doing religious acts, *Rakhmabai* v. *Radhabai*[2], *Padajirav* v. *Ramrav*[3], *Amava* v. *Mahadgauda*[4], *Narayanaswami* v. *Mangamma*[5], *Kakerla Chukkamma* v. *Kakerla Punnamma*[6], *Raja Venkatappa* v. *Ranga Rao*[7], *Muthusami* v. *Pulavartal*[8]. The same principle is applied where power of adoption has been given to all the wives severally, *Bijoy Krishna Karmakar* v. *Ranjit Lal Karmakar*[9], *Saroda Prasad Pal* v. *Ram Pati Pal*[10].

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1. (1928) 55 M.L.J. 778 : L.R. 55 I.A. 139 : I.L.R. 3 Luck. 76 (P.C.).
. (1868) 5 Bom.H.C.R. A.C.J. 181.
2. (1888) I.L.R. 13 Bom. 160.
3. (1896) I.L.R. 22 Bom. 416.
4. (1905) 15 M.L.J. 143 : I.L.R. 28 Mad. 315.
6. (1914) 28 M.L.J. 72.
7. (1915) 29 M.L.J. 18: I.L.R. 39 Mad. 772.
8. (1923) 42 M.L.J. 101 : I.L.R. 45 Mad. 266.
9. (1911) I.L.R. 38 Cal. 694 ; s. c. on appeal (1912) I.L.R. 39 Cal. 582.
10. (1912) 17 Cal.W.N. 319.

But it is apparent that this rule of preference of the senior wife can apply only as between the *living* wives of a person and not for elucidating the rights of wives dead prior to the adoption. It will be fantastic, for instance, to import the rule to hold that as between two predeceased wives of a widower the first married woman alone becomes the mother of the boy adopted by him even where she had died earlier than the other wife of her husband. It will involve more than one fiction: (*i*) by adoption the boy became a son of the widower, (*ii*) by reason of wifehood to the adopter the predeceased wife became his mother, and (*iii*) that the relationship would always date back to the date of the first marriage of the adopter.

Examining the textual law, it is clear that the association of the wife in performing rites is essential from the religious standpoint. Apararka observes[1]: "A man is not fit for *karma*, Oh King, without a wife, whether he is Brahmin, Kshatriya, Vaisya or Sudra. The wife is the chief factor in the attainment of *dharma*, *artha*, and *kama*." Apastamba lays down that the husband and wife have to perform religious rites together:

जायापत्योर्नवि भागो विद्यते । पाणिग्रहणाद्धि सहत्वं कर्मसु[2].

It was because of this principle that Rama is said to have performed sacrifices with a golden image of Sita—काञ्चनीं मम पत्नींच[3]. The Taittiriya Brahmana declares[4]:

अर्धो वा एतस्य यज्ञस्य मीयते यस्य प्रत्येऽहन् पत्न्यनालम्भुका भवति ॥

—"half of the sacrifice is destroyed in the case of that sacrificer whose wife is (in her monthly courses and therefore) unavailable on the sacrificial day." It is however only a wife who is a patni that has this ceremonial competency. Panini states: पत्युर्नो यज्ञ संयोगे[5], and the particle *ni* is added to *pati* to signify one who partakes in the holy sacrifices. The status of *patni* arises in favour of a wife if she is married in the dharmic forms. In discussing the meaning of the term *patni* in Yajnavalkya's text declaring the heirs to a deceased person, the Mitakshara points out that *patni* is she who is so made by marriage and the singular number indicates the class, so much so all the wives married in the approved forms become patnis—see *Raja Venkatappa* v. *Ranga Rao*[6]. The Viramitrodaya states[7]: "First of all the *patni* or the lawfully wedded wife takes the estate. The term *patni* itself signifies a woman espoused in the prescribed form of marriage. Agreeably to the aphorism of Panini the term *pati* (husband) is changed into *patni* (meaning the correlative) implying the relation through a sacrifice. The singular number in the term *patni* in Yogiswara's text implies the class." A text of Baudhayana makes it clear that a wife married in the unapproved forms does not acquire the status of a *patni* but becomes a *dasi*. The passage is[8]:

अथाप्युदाहरन्ति । क्रीताद्रव्येणया नारी सा न पत्नी विधीयते । सा न दैव न सा पित्र्ये दासीं तां कश्यपोब्रवीत् ।

—"a woman who is purchased with wealth is not declared to be a *patni*; she is not to be associated in rites for the gods or manes and Kasyapa declares that she is a *dasi*." The test of *patnihood* for religious purposes thus turns upon the form of marriage, dharmic or non-dharmic, and not on whether the woman is the senior wife or the junior wife. This is intelligible because a second wife is permissible according to the Sastras even while the first wife is alive, in certain cases, as for instance where the first wife is not fit for *dharma* or has no progeny or is disqualified

1. Anandashrama Series, Vol. 48, p. 72.
2. Apastamba, II. 6, 13, 16-17.
3. Ramayana, VII. 91, 25.
4. III. 7, 1.
5. IV. 1, 33.
6. (1915) 29 M.L.J. 18: I.L.R. 39 Mad. 772.
7. Cited in I.L.R. 9 Cal. 580, 583.
8. I. 11, 20.

for other reasons[1]. And the Sastras expressly direct the taking of a second wife and the association of a junior wife, for instance, when the first wife is dead, because the first wife would be cremated with the sacred fires and sacrificial utensils of the husband if she predeceased him[2]. The Mitakshara in commenting on Yajnavalkya's text[3] observes : " having burnt with agnihotra fire . . . his dead wife . . . the husband should take again another wife and another fire according to laws, provided that he has not yet begot any son or has not completed his sacrifices or is not entitled to enter another order of life." The Ghobila Smriti[4] states :

मृतायामपि भार्यायां वैदिकाग्निं न हित्यजेत् ।

उपाधिनापि तत्कर्म यावज्जीवं समापयेत् ॥

—" When a householder's wife dies he should not give up his vedic fires, but that agnihotra should be performed till one's life by means of an *upadhi*" (*i.e.*, by marrying another savarna wife or by associating with himself an asavarna wife). It is in this background that the description of the senior wife as *dharma patni* will have to be understood. A sloka cited in Colebrooke's Digest[5] states that the first is the wife married from a sense of duty and it is she whom acts of duty concern. This does not mean that the other wives are incompetent for acts of dharma ; it only means that the eldest wife is to be preferred for such acts and should not without just cause be superseded. She is *primus inter pares*. The decisions have held that if the husband himself ignored this consideration the efficacy of the act done by him with a junior wife will not in any way be nullified, however sinful such an act may be from the religious aspect. The sastraic preference of the senior wife is now in practice subject to the husband's control. Again under the Sastras this preference of the senior wife arises only in a case of competition among living wives. Katyayana states[6] : " Let him who *has* many wives employ one of equal class in the case of sacrificial fire and in attendance on himself, but *if there be many such let him employ the eldest in these duties provided she be blameless*." The language shows that the senior wife's right to be associated in only a rule of preference and not a denial of the competency of the other wives in regard to acts of dharma. The term " blameless " will otherwise have no significance. The language also contemplates the presence of a number of wives and a choice from among them. Yajnavalkya has a similar rule. He says[7] : " When there is a wife of an equal class *present* (सत्यम्) never do acts of religion with the wives of any other class. When there is more than one wife of the same class as yourself, in matters of religion never employ any but the eldest." The Mitakshara in commenting on the text lays down : " When there is a wife of equal class never do acts of religion with wives of any other class. When there are several wives of the same class in matters of religion do not pass over the eldest wife and do not employ either the second or the third." The text of Yajnavalkya taken with the comment of the Mitakshara shows that its object is to prohibit unjust supersession of the senior wife by a junior wife and not to declare the ceremonial incompetency of the latter. Also that the rule is to be applied in the case of competition between living wives. To the same effect is a text of Vishnu[8] :

सवर्णासु बहुभार्यासु विद्यामानासु ज्येष्ठया सह धर्मकार्यं कुर्यात् । मिश्रासु च कनिष्ठयापिसमानवर्णया । समानवर्णया अभावे त्यनन्तरयैवा पदि च । नत्वेव द्विजः शूद्रया ॥

—" If all the wives are of the same caste, then the wife whose marriage took place first was to be associated with the husband in all religious acts ; if a man had wives

1. Manu, V. 80-81 ; Yajnavalkya, I. 80.
2. Manu, V. 167-168 ; Yajnavalkya, I. 89.
3. Yajnavalkya, I. 89 (S.B.E. series, Vol. 21, p. 178).
4. III. 9 cited in Kane, History of Dharmasastras, Vol. 2, Part I, p. 64.
5. Book. IV, Ch. I, sloka 51.
6. Cited in *Muthuswami* v. *Pulavartal*, (1923) 42 M.L.J. 101 : I.L.R. 45 Mad. 266.
7. II. 84.
8. Vishnu D.S., 26, 1-4.

of different varnas the wife of the same varna with the husband had precedence though her marriage might have been later in date. If there is no wife of the same varna as himself, the husband may associate with himself in religious rites even a wife of the varna immediately next his own but a dvija should never associate a Sudra wife with himself in religious ceremonies." The foregoing citations show : (*i*) every wife married in the approved form is ceremonially competent and can take part in acts of dharma, (*ii*) when there are many wives of the same class, other things being equal, the senior wife has precedence and is to be associated in acts of religion, (*iii*) where such a wife is dead or becomes disqualified the next senior wife should be selected, and (*iv*) these rules regulate precedence as between living wives. To apply the rule for determining as to which of two predeceased wives of the adopter—where the adoption is by a widower—becomes the mother of the boy is not justifiable. For it does not give effect to the rule that when the first wife dies the next wife becomes the dharma patni and in fact a wife has to be taken in order that acts of religion may be done properly. So if at all maternal affiliation can be retrospective it could arise only with reference to the wife who died last whether the wives had been married each after the death of the other or even during the lifetime of an existing wife. There is absolutely no justification to carry the maternal affiliation to any point of time earlier than the date of the death of the wife who died last. It is also noteworthy that present trends are against any retrospective maternal affiliation. The Hindu Law of Inheritance (Amendment) Act, 1929, states in section 2 : " Provided that a sister's son shall not include a son adopted after the sister's death." In *Subramanian* v. *Muthia Chettiar*[1] it was observed : " It is contended that the fiction that the adoption should be considered to have taken place in the lifetime of the adoptive father should be confined only to adoptions by a Hindu widow after her husband's death and not to cases of adoption made by a widower so as to make the adopted son the son of his deceased wife. It is true that there are no authorities on the point. But then that is no reason why this distinction should be made ". The learned Judges overlook that the importation of the doctrine will result in this anomaly, namely, that with reference to the adopter the son is fictionally born in his family on the date of the actual adoption but with reference to the wife he should be deemed to have come into existence on the date of her death, a *different date* ; so much so, the son comes into existence not at the same time as regards both parents but at one time with reference to his father and at another time with reference to his mother. Adoption ceases to be an imitation of nature but a mockery of it. One other point falls to be noted. In the above decision the learned Judges guarded themselves against the application of the principle to a case where there had been more than one predeceased wife of the adopter. The Judges noted : " In the case before us, no complication arises from the fact that Subramanian had more than one wife." In the result, the answer to the fourth question would be that assuming that in the case of an adoption by a widower the predeceased wife can be regarded as mother of the boy for purpose of inheritance rights to and through her, a conclusion which is open to challenge, yet where there is more than one predeceased wife, maternal affiliation can be attributed only to that wife of the adopter who died last and it is her ancestors that will become the maternal ancestors of the boy.

S. VENKATARAMAN.

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1. (1945) 2 M.L.J. 337 : I.L.R. (1945) Mad. 638.

SUMMARY OF ENGLISH CASES.

DENNANT *v.* SKINNER, (1948) 2 All.E.R. 29 (K.B.D.).

Contract—Auction—Property in goods when passes—Subsequent arrangement that property should not pass till cheque is honoured—Effect.

Prima facie in an auction sale property passes to the bidder on the fall of the hammer. However the passing of property and the right to possession are two different things. Though property had passed the auctioneer has a right to retain possession of the goods until payment was made. If when he was ready to deliver the goods, payment was not made, he can sue for the price or exercise powers of re-sale or he can secure himself by way of lien on the goods for the price. But once he chose, for reasons, good, bad or indifferent, as a result of statements fraudulent or honest, to part with possession of the goods by giving delivery of it, he then lost his seller's lien and has no longer a right to possession of the goods. The auctioneer cannot claim the goods when the cheque for its price is not honoured though there might have been such an arrangement before delivery is taken.

ASKEY *v.* GOLDEN WINE CO., LTD., (1948) 2 All.E.R. 35 (K.B.D.)..

Damages—Wholesaler fined in criminal proceedings for selling contaminated cocktails and also refunding to retailers the cost of all bottles returned by them—If entitled to damages from his suppliers.

In 1944, there appeared in the market a quantity of so-called cocktails which contained methylated spirit and on that account were unfit for human consumption. The principal participators were convicted in the Criminal Courts. *A*, the wholesale merchant marketing that mixture, sued the manufacturers who supplied him for damages. The manufacturers made the liquid and bottled it. *A* supplied the labels which described the contents as "Red lady" or "Paradise" cocktails and the proprietors as "Gordon products" under which name the plaintiff was trading. *A* had no warehouse of his own. He used to collect the cases of bottles from the defendants' factory and deliver it direct to the retailers to whom he sold it. The manufacturers were charged and convicted for not paying customs and also for possessing and selling contaminated wine. Two of them were sentenced to imprisonment and fine and the third who was sentenced to fine only remained out and carried on the business. *A* was himself summoned in January, 1945, for offences under the Food and Drugs Act in respect of the sale of the wine containing methylated spirits and was fined in all £316-15-0 and £83 costs. In consequence of this all the bottles with the retailers were returned to him and he had to refund £1,735-17-8, the amount they had paid him. *A* sued the manufacturers claiming as damages all those amounts.

Held, although *A* was not a party to the conspiracy, he was guilty of gross negligence in not taking steps to see that the liquid was fit for sale and he cannot recover any of the amounts claimed by him from the defendants.

The punishment inflicted by a Criminal Court is personal to the offender and the Civil Courts will not entertain an action by the offender to recover an indemnity against the consequences of that punishment. The punishment is fixed having regard to the personal responsibility of the offender in respect of the offence, to the necessity for deterring him and others from doing the same thing again, to reform him, and, in cases such as the present to make him and others more careful in their dealings, to make him choose with more discrimination his suppliers or his servants and to make him more exact and scrupulous in his supervision of the matters for which he is responsible. All these objects would be nullified if the offender could recover the amount of the fine and costs from another by process of the Civil Courts. Nor is he entitled to indemnity for the amounts refunded to the retailers.

Public policy requires that no right of indemnity or contribution or damages should be enforced in respect of expenses which the plaintiff has incurred by reason of being compelled to make reparation for his own crime. The money which the plaintiff had to repay the retailers was reparation for his own crime of selling contaminated liquor without lawful excuse.

[The defendants also will not get any assistance. So they were not allowed any costs.]

SQUIRE *v.* SQUIRE, (1948) 2 All.E.R. 51 (C.A.).

Divorce—Wife's nagging and preventing her husband going to sleep—If " cruelty "—Conduct of wife caused by her ill-health—Effect.

Motive is not a necessary element in cruelty. Where it is found that a wife systematically for nights on end prevented her husband from sleeping demanding that he read to or conversed with her and if he showed signs of going to sleep she unreasonably demanded that he should perform various menial services for her and/or stripped the clothes from his bed and/or moved furniture about the room and/or switched electric lights on in the room whereby the husband was deprived of sleep and suffered in health, the acts amount to cruelty though such conduct was due to the wife's illness and did not consist of malignant acts done with the intention of injuring the husband. The husband is entitled to a decree for divorce *nisi* on the ground of the wife's cruelty.

(1947) 2 All.E.R. 529, reversed.

Per *Hudson, J.*—Looking at the established acts of the wife against the background of the special facts of this case including what is surely not an uncommon feature of married life, *viz.*, one ailing spouse making exacting and unreasonable demands on the other partner—demands which deprived the other of sleep from time to time—it cannot be said that by such acts cruelty has been established.

BETTELEY, LTD. *v.* SINGTON, (1948) 2 All.E.R. 81 (K.B.D.).

Defence Regulations—Provision for minimum fine to be such that offender " derives no benefit from the offence " (selling at above controlled price)—Income-tax and Excess Profits tax paid if to be considered in fixing the fine.

In assessing the amount which " in the opinion of the Court, shall secure that the offender derives no benefit from the offence " (selling goods at above the controlled price) it is impossible to shut out the tax which has been suffered by the offender. An offender who should be given a minimum penalty should only pay that amount by which he was in fact better off that is after deducting the taxes on the profits derived.

SAYCELL *v.* BOOL, (1948) 2 All.E.R. 83 (K.B.D.).

Road Traffic Act (1930), *section* 7 (4)—*Person disqualified from holding driving licence—Steering lorry down a hill into his garage without starting engine—If guilty of "driving."*

A lorry owned by *X* a person disqualified from holding a driving licence was standing at the head of an incline. There was no petrol in the tank and *X* having released the brake, set the lorry in motion by pushing it, got into the driving seat and let the lorry go down the hill so as to get into his garage.

Held : It cannot be said that he was not " driving " the lorry for the purposes of the Road Traffic Act. [As however the order disqualifying *X* from holding a licence was set aside on appeal the Court intimated to the justices that only a technical offence was committed and that special reasons do exist for not disqualifying *X* for holding a licence by reason of his conviction for the technical offence.]

ALEXANDER'S WILL TRUST, *Re*, (1948) 2 All.E.R. 111 (Ch.D.).

Will—Construction—Bequest of " my diamond bracelet " to a beneficiary and by subsequent clause bequest of " my diamond chain bracelet " to another beneficiary—Only one bracelet in existence—Latent ambiguity—Extrinsic evidence—Admissibility—Rights of beneficiaries.

By clause 3 of her will the testatrix made a number of bequests including specific bequests of jewellery. All the bequests in the clause were numbered and No. 19 was in the following terms : " To *X* my long pearl earrings—my best presentation bag—dressing case with its fittings—my five row diamond bracelet and my black coat with lamb fur collar."

By No. 31 of the list she gave " To *Y* my diamond chain bracelet." The testatrix possessed only one diamond bracelet accurately described as a chain bracelet, but containing eight and not five rows of diamonds. On a construction of the will,

Held : On the whole there is a latent ambiguity as to the bracelet and evidence is admissible as to what was intended to be bequeathed. The evidence established that the testatrix used to call this bracelet " five row diamond bracelet " and " diamond chain bracelet." In both items 19 and 31 the testatrix was referring to the same article. As the bracelet was divisible each legatee was entitled to a moiety. Where the same thing is given to two different persons in different parts of the same instrument each may take a moiety.

JEFFREY, *Re*, (1948) 2 All.E.R. 131 (Ch.D.).

Will—Construction—Gift of residue to "my brothers R *and* A *also* G *and* E"—G *and* E *children of deceased brother—Beneficiaries to take* per capita *and not* per stirpes.

The testatrix after providing for al ife estate bequeathed her residuary estate to " my brothers *R* and *A* also *G* and *E* equally." *G* and *E* were children of a deceased brother of the testatrix. On a construction of the will,

Held : The division is to be *per capita*—as the gift is to the four persons *nominatim*.

GRIMES *v.* GRIMES, (1948) 2 All.E.R. 147 (P.D.).

Husband and wife—Practice of coitus interruptus *by husband against the wishes of the wife—If wilful refusal to consummate.*

Where a husband against the wishes of the wife persists in practicing *coitus interruptus*, the marriage must be held to have not been consummated so as to entitle the wife to a decree of nullity.

(1947) A.C. 274, distinguished.

WHITE *v.* WHITE, (1948) 2 All.E.R. 151 (P.D.).

Husband and wife—Practice of coitus interruptus *against the wishes of the wife—If wilful refusal to consummate marriage entitling wife to decree of nullity or cruelty entitling wife to decree for dissolution.*

Even though the husband always practiced *coitus interruptus* it cannot be said that the marriage had not been consummated so as to entitle the wife to a decree of nullity of marriage. But when such conduct of the husband was undermining the health of the wife it constitutes cruelty in law sufficient to entitle the wife to a decree for dissolution of marriage.

(1948) A.C. 274, applied.

(1948) 2 All.E.R. 147, not followed.

FISH *v.* KAPUR, (1948) 2 All.E.R. 176 (K.B.D.).

Tort—Negligence—Dentist extracting tooth—Fracture of jaw and leaving a root of the tooth—If evidence of negligence on the part of the dentist.

The fact that fracture of the jaw was caused in the process of extraction of a tooth or a root of the tooth was left in is in itself no evidence of negligence on the part of the dentist. The doctrine of *res ipsa loquitor* has no application to such a case.

MEDITERRANEAN AND EASTERN EXPORT CO. *v.* FORTRESS FABRICS, (1948) 2 All.E.R. 186 (K.B.D.).

Arbitration—Contract in respect of textile goods—Arbitration by person with experience in the trade—Claim for price of goods—Award of damages for buyers refusing to take goods—Validity—Arbitrator—If bound to take evidence.

Many trades have their own tribunals of arbitration and it is open to an arbitrator skilled in the trade to use his own knowledge and experience on many matters, such as quality, without having witnesses called before him. One of the reasons why commercial men like to go to arbitration before arbitrators of this description is because it saves the expense of calling witnesses and having the conflicting views of experts thrashed out and decided on. The parties are content and intend to accept the judgment of a man in their own trade on whose judgment they know they can rely. The same principle applies to the question of damages for breach of contract (of sale of textiles) as to a question of quality.

Where the claim by sellers is for the price but the arbitrator finds that property has not passed, an award of damages to the sellers is clearly within the jurisdiction of the arbitrator. Because the sellers put forward a claim on a wrong basis, it cannot be said that the arbitrator is not entitled to award compensation on the true basis, *i.e.*, damages instead of price.

STEELE WILL'S TRUSTS'S, *Re*, (1948) 2 All.E.R. 193 (Ch.D.).

Will—Construction—Bequest of family jewel to be held by the successive eldest sons of the testatrix's descendants as heirloom—Right of beneficiaries.

The testatrix provided by a clause in her will " I give my diamond necklace to my son Charles Steele to go and be held as an heirloom by him and by his eldest son on his decease and to go and descend to the eldest son of such eldest son and so on to the eldest son of the descendants as far as the rules of law and equity will permit and I request my said son to do all in his power by his will or otherwise to give effect to this my wish." Charles Steele the son died leaving a will providing " I give my diamond necklace to my trustees epon trust for my son *S* during his lifetime and after his death to his eldest son absolutely." *S* had a son *D* who had a son born after the death of the testatrix. On a construction of the will,

Held : The rule in *Shelly's case* (6 Equity 540) applied to the construction of the testatrix's will. The necklace should have been held by Charles Steele for life thereafter to his son *S* for life and thereafter to his son *D* for life and after the death of the survivor of them in trust for the son or grandson of *D* absolutely.

MORGAN AND SON, LTD. *v.* MARTIN JHONSON & CO., LTD., (1948) 1 All.R. 196 (C.A.).

Practice—Summary suit—Defendant admitting claim but claiming an equitable set-off and counter-claim—Leave to defend.

An action was brought under Rules of Supreme Court, Order 14 by the plaintiff against the defendant claiming £353-3*s.* being charges for open storage accommodation provided by them for defendant's vehicles and some telephone charges. The defendant while admitting the claim alleged that the plaintiffs in breach of the terms of the contract and in breach of their duty as bailee . . . . . either delivered up a vehicle to some one without the authority of the defendant or alternatively kept so ineffective a watch on the said vehicle that it was stolen and claimed

that he was entitled to set-off and counter-claim the value of that vehicle £375. In the circumstances,

Held: Strictly speaking the defendant should have unconditional leave to defend (though he will be protected sufficiently by an order that there should be a judgment for the plaintiff with a stay of execution). Effect must be given to the defence of equitable set-off. Equity would deal with the matter by deducting from the claim of the plaintiff all that ought to be deducted in respect of the failure, if failure be proved, to deliver the vehicle that plaintiff received from the defendant.

CHARLES OXFORD *v.* GONSHAW, (1948) 2 All.E.R. 229 (C.A.).

Practice—Striking out defence—When proper—Non-compliance with order for inspection of goods—If ground for striking out—R.S.C., Order 31, rule 21—If applicable.

The defendants who were ordered to give inspection of the goods (clothing) referred to in the defence failed to give inspection and the plaintiff obtained an order striking out the defence, under R.S.C., Order 31, rule 21 which provided for striking out defence if a defendant fails to comply with an order for discovery and inspection of documents. On appeal,

Held: If in the order for inspection it had been provided that in default the plaintiff should have liberty to sign judgment such judgment can be signed. In the absence of such a provision, the failure to comply with the order for giving inspection of the goods, does not fall within the phrase " discovery or inspection of documents " in Order 31, rule 21 of the R.S.C. Although the lower Court was purporting to exercise a different jurisdiction (*i.e.*, under Order 31, rule 21) that does not prevent the appellate Court from giving relief on the ground that the defence is vexatious and oppressive if that is the proper course to take.

The specific sentences in the defence dealing with the cloth and the garments of which inspection ought to have been given must be struck out as vexatious and oppressive.

The effect of striking out parts of the defence would be to leave the rest of the defence in tact for what it is worth, and if it is sufficient to prevent the plaintiffs obtaining summary judgment they will have to go to trial in the ordinary way and have to prove their case.

PEARSON *v.* COLEMAN BROTHERS, (1948) 2 All.E.R. 274 (C.A.).

Tort—Child visiting circus—Unauthorised entry into " zoo " attached to circus—Liability of owners of circus for injury caused by lion to the child—Child, if invitee.

The infant plaintiff, being then of the age of 7 years went with her sister aged 12, to visit a travelling circus owned by the defendants. There was a gate entrance to the field in which the circus tent was pitched and a " zoo " laid out. From that entrance gate there was a way leading to the circus tent. The circus proprietors did not insist on small children being accompanied by adults ; but in the ordinary way of the circus business the admission of small children without adults would be perfectly a proper thing. The " zoo " was a rough and ready enclosure made up of a sort of lager, in which the waggons belonging to the show were put round, the intervals between them being filled by canvas strips. There was a definite entrance to the zoo enclosure but access to the enclosure was possible by persons agile enough to crawl under the canvas or under the caravans and waggons. But the " entrance " was the only authorised one. The plaintiff crawled in and obtained access near the lion's cage (not by the regular entrance) where she was mauled by the lion putting out its claws under the bars. The plaintiff went round seeking a quite corner where she could retire to relieve herself (no lavatories had been provided by the defendants) and crawled into the zoo where she was injured. Considering the peculiar circumstances,

Held, that the defendants were liable in damages to the plaintiff who must be regarded as an invitee.